ATTORNEY FOR APPELLANT:

ANTHONY S. CHURCHWARD
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KENTON A. SECOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 92A03-0602-CR-00076
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0306-FB-115

November 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following his guilty plea, Appellant, Kenton Secor, challenges the trial court's imposition of an aggregate thirty-year sentence for his conviction of Burglary as a Class B felony,[1] Auto Theft as a Class D felony,[2] and his being found to be a habitual offender.[3] Upon appeal, Secor claims that the trial court erred in failing to consider his guilty plea as a mitigator, and further, that his sentence was inappropriate in light of his character and the nature of his offense.

We affirm.

According to the factual basis entered during the plea hearing, Secor, who proceeded pro se, stated that on June 21, 2003, he broke and entered the dwelling of Max and Jane Goldwood in Whitley County, with the intent to commit a theft inside. Secor testified that he initially tried to get into the house through the back door, but it was locked, and he only succeeded in breaking off the handle. According to Secor, he then walked to the front of the house, "kicked the strike plate and entered." Tr. at 13. Upon gaining entry, Secor exerted unauthorized control over property which was not his by walking out with a dresser drawer, U.S. currency, miscellaneous paperwork and knives. Secor did not have permission from the Goldwoods to take their property.

According to Secor, his transportation to the Goldwood residence was a red Chevrolet S-10 Blazer, which he had stolen two weeks prior to the date in question from a location at Lake Wawasee and had subsequently driven into Whitley County. Secor

[1] Ind. Code § 35-43-2-1 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-43-4-2.5 (Burns Code Ed. Repl. 2004).

[3] Ind. Code § 35-50-2-8 (Burns Code Ed. Repl. 2004).

testified that two additional occupants of the truck, Rachel Sheets Anderson and Matt Wagner, tried to talk him out of breaking into the Goldwood residence. Secor confirmed that the truck's owner, Jason Wells, had not authorized him to use it.

On June 23, 2003, Secor was charged with burglary as a Class B felony, theft as a Class D felony, and auto theft as a Class D felony. At the initial hearing, Secor waived his right to counsel and chose to proceed pro se. Secor then pleaded guilty to all three charges. The court accepted Secor's plea and entered judgment of conviction on all three charges. On July 10, 2003, the State filed an additional information alleging Secor to be a habitual offender. On July 14, 2003, the court sentenced Secor to twenty years with the Department of Correction for the burglary conviction and three years with the Department of Correction for the auto theft conviction, with the sentences to be served concurrently. The court "merged" Secor's theft conviction into the burglary conviction.[4] In a habitual offender hearing on September 22, 2003, Secor, who was represented by counsel, admitted his habitual offender status based upon his April 29, 1998 and February 10, 2000 felony convictions for theft. Secor made this admission pursuant to a plea agreement providing that he would receive a ten-year enhancement. Pursuant to Secor's admission, the court found him to be a habitual felony offender and modified its July 14, 2003 sentence on Secor's burglary conviction to provide that Secor serve the original

[4] At sentencing, the court "merged" the theft conviction with the burglary conviction and did not sentence Secor upon the theft conviction, under the apparent reasoning that the theft conviction was the underlying felony for the burglary conviction. We need not discuss the court's apparent concern about double jeopardy problems with the burglary and theft convictions, nor need we concern ourselves with the court's "merger." Secor pleaded guilty to all three charges, and the merits of his convictions are not available for review upon direct appeal. Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) ("One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal.")

twenty-year sentence, plus an additional ten years for the habitual offender enhancement, totaling thirty years, to be served in its entirety. The court also restated that Secor's sentence for the auto theft conviction was three years executed, to be served concurrently with his sentence on the burglary conviction. In pronouncing Secor's sentence, the court found the following as aggravating circumstances: (1) Secor had five prior felony convictions and eight prior misdemeanor convictions; (2) Secor's juvenile history; (3) Secor violated the terms of his probation; and (4) Secor's history of substance abuse. The court further found as a mitigating circumstance Secor's cooperation with the police investigation in the instant case.

On March 1, 2004, Secor filed a pro se Petition for Modification of Sentence, which the court denied. On May 20, 2004, he filed a pro se Petition for Post-Conviction Relief, which the court forwarded to the Public Defender of Indiana. See Indiana Post-Conviction Rule 1(9). On April 11, 2005, Secor, through counsel,[5] filed a Motion to Dismiss Petition for Post-Conviction Relief Without Prejudice and Petition for Appointment of Counsel at County Expense to Pursue Proceedings under Indiana Post-Conviction Rule 2, which the court granted. On April 19, 2005, Secor, through different counsel, filed a petition to file a belated notice of appeal pursuant to Indiana Post-Conviction Rule 2(1). On October 25, 2005, the court granted Secor's petition to file a belated notice of appeal. Secor filed a belated notice of appeal on November 1, 2005.

[5] Secor was represented by the State Public Defender in his Motion to Dismiss his Petition for Post-Conviction Relief and Petition for Appointment of Counsel. Following the court's granting these petitions, terminating Secor's post-conviction petition and appointing new counsel at county expense, the Deputy Public Defender representing Secor was granted leave to withdraw from the case. The attorney who had represented Secor during the habitual offender phase of his plea was also granted leave to withdraw.

Upon appeal, Secor claims that the trial court erred by failing to consider his guilty plea as a significant mitigating circumstance together with the mitigating circumstance of his cooperation with authorities, which Secor claims should serve to counterbalance the three aggravating circumstances found by the court. Secor further claims his sentence is inappropriate in light of his character and the nature of his offense.

We bear in mind that sentencing determinations, including whether to adjust the presumptive sentence, are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances to modify the presumptive sentence, it must do the following: (1) identify all significant aggravating and mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

Regarding Secor's challenge to the appropriateness of his sentence, we note that a defendant may challenge the appropriateness of his sentence in any case where the trial court exercises discretion upon sentencing the defendant. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Jones v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004) (citing Ind. Appellate Rule 7(B)), trans. denied.

Secor claims that the trial court erred in failing to consider and give due mitigating weight to the fact of his guilty plea. In sentencing Secor the trial court considered the four aggravating circumstances of (1) Secor's five prior felony convictions and eight

prior misdemeanor convictions; (2) Secor's juvenile history; (3) Secor's violation of the terms of his probation; and (4) Secor's history of substance abuse. The trial court weighed these aggravators against the mitigating circumstance of Secor's cooperation with the police investigation in the instant case.

An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id. Regarding Secor's claim that his guilty plea merited mitigating weight, we are reminded that although a trial court should be inherently aware that a guilty plea is a mitigating factor, such plea is not necessarily a significant mitigating factor. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Here, in readily taking the plea, Secor saved the State the resources necessary for a trial, and his comments during the plea and sentencing hearings indicate what appears to be his wish to take full responsibility for the crimes. Nevertheless, the strong evidence linking Secor to the crimes, including his statements at the scene and afterward admitting full responsibility, suggest his plea may have been just as much a pragmatic decision as an effort at taking responsibility. Indeed, Secor stated at the sentencing hearing, "I was caught in the act. There is no reason for a trial." Tr. at 19.

Furthermore, the aggravators in this case are adequately substantial to outweigh the mitigators, even if significant weight were attributed to the fact of Secor's guilty plea.

Secor does not challenge the court's finding of aggravators, which include a criminal history of five felonies and eight misdemeanors, nor does he contest the fact that the convictions serving as the basis of his habitual offender status were, like the convictions at issue in the case at hand, theft and auto theft convictions.[6] A single aggravator may be sufficient to enhance a sentence. Davis v. State, 796 N.E.2d 798, 807 (Ind. Ct. App. 2003), trans. denied. In light of Secor's criminal history, which indicates his continuing propensity to re-offend, we find no error in the court's weighing the aggravating and mitigating factors and imposing the maximum twenty-year and three-year sentences on the burglary and auto theft convictions, respectively.

Secor further contests his sentence on the basis that it is inappropriate in light of his character and the nature of his offense.[7] According to his own admissions at the plea hearing, the incident leading to the convictions in the current case involved Secor driving a vehicle he had stolen to the house of his friend's parents, and, in spite of his friend's protests, breaking into the house in order to commit a theft inside and walking out of the house with various items in hand, including money, paperwork, and knives. With respect to his character, Secor has a criminal history including at least five felony convictions, he has admittedly violated his probation, and he has what he terms to be a "very bad substance abuse problem" which has led him to commit many crimes. Tr. at 19. Given

[6] The pre-sentence investigation report is not a part of the record upon appeal. Based upon the judgments of conviction introduced to establish Secor's status as a habitual offender, Secor was convicted on April 29, 1998, of two counts of theft and one count of auto theft, and on February 10, 2000, of one count of theft in each of two additional cases.

[7] We do not include Secor's habitual offender enhancement in our review of the appropriateness of his sentence, as this enhancement was a fixed ten-year period pursuant to a plea agreement and was not subject to the trial court's discretion. See Childress, 848 N.E.2d at 1078 n.4.

Secor's character and the nature of the instant offenses, we conclude the twenty-year aggregate sentence he received for his burglary and auto theft convictions is appropriate.

Having determined that the trial court was within its discretion in sentencing Secor to a twenty-year sentence for his burglary conviction and a three-year concurrent sentence for his auto theft conviction, and considering Secor's ten-year enhancement due to his status as a habitual offender, we affirm the trial court's imposition of a thirty-year aggregate sentence.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.